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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 694

HERBERT CLAY,

Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

HERBERT CLAY,

Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above entitled case on June 16, 1970.

Citation to Opinion Below

The opinion of the Court of Appeals of Kentucky is reported at 454 S.W.2d 109, and printed in the Appendix, *infra*, pp. 21-23. It affirmed the judgment of the Harlan Circuit Court, which is printed in the Appendix, *infra*, pp. 19-20.

Jurisdiction

The judgment of the Court of Appeals of Kentucky was entered on June 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

Statute Involved

KENTUCKY RULES OF CRIMINAL PROCEDURE, RULE 11.42

11.42 Motion to vacate, set aside or correct sentence.

(1) A prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed the sentence to vacate, set aside or correct it.

(2) The motion shall be signed or verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the Attorney General and the Commonwealth's Attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the Commonwealth shall have 20 days after the date of mailing of notice by the Clerk to the Attorney General in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that can-

not be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and is financially unable to employ counsel, shall appoint counsel to represent him in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him a new trial, or correct the sentence as may be appropriate.

(7) Either the movant or the Commonwealth may appeal to the Court of Appeals, as a matter of right if the controversy involves a sentence of confinement for twelve months or more, and on motion otherwise.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.54 and shall remain suspended until final disposition of an appeal duly taken and perfected.

(9) Counsel appointed for the movant under this Rule shall be entitled to reimbursement by the Commonwealth for his reasonable expenses of travel and subsistence for necessary conferences with the movant at his place of confinement, provided that each trip made for that purpose be authorized in advance thereof by order of the trial court.

(10) Original applications for relief of the nature described in this Rule that are addressed directly to the Court of Appeals shall be referred to the Chief

Justice, who may cause same to be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth. (Am. Eff. 1-1-65)

Questions Presented

1. Does the Fourteenth Amendment require the states to afford state prisoners a corrective post-conviction process for the hearing and determination of all claims of violation of federal constitutional rights?

2. Does a decision of the highest court of a state refusing to set aside a conviction challenged in a post-conviction proceeding as having been obtained in violation of due process of law, because the prisoner had failed to appeal from his conviction, rest on adequate state grounds so as to preclude this Court from considering the substantive constitutional question.

3. In a homicide prosecution, is it a violation of due process of law for the prosecution and the police to fail to disclose the results of a scientific test which would support the contention of the accused that the killing was accidental and refute the contention of the state that the killing was wilful.

Statement of the Case

On March 28, 1968, the petitioner was brought to trial before the Circuit Court of Harlan County, Kentucky on a charge of wilful murder, allegedly committed on September 23, 1967. The principal witness for the prosecution testified that the petitioner committed the offense by pull-

ing the deceased out of the petitioner's automobile, shoving the deceased against a co-defendant, and then shooting him (Tr. pp. 3-5; App. *infra*, pp. 25-26).* The petitioner testified that he was attempting to remove the deceased from the front seat of the automobile, when the deceased seized a .45 caliber automatic pistol from the petitioner's belt, precipitating a struggle during which the pistol was accidentally discharged (Tr. pp. 27-29; App. *infra*, pp. 26-29).

On September 24, 1967, an investigation into the alleged homicide was undertaken by the Kentucky State Police, at which time samples of cotton fiber with red stains were removed from the front seat of the petitioner's automobile (Tr. pp. 37-38; App. *infra*, pp. 30-31). The samples were analyzed by the Kentucky State Police Laboratory, in Frankfort, Kentucky and by the Federal Bureau of Investigation in Washington, D.C. A report of the test results was sent by the Bureau to the Kentucky State Police Laboratory, which in turn sent it to Kentucky State Police Post 10, Harlan, Kentucky. The report and a package containing the samples from the seat of the petitioner's automobile were made a part of the "Hatmaker homicide investigation" file maintained by Post 10 (Tr. pp. 38-40; App. *infra*, pp. 30-32). The file was made available to the prosecuting attorney (Court of Appeals Opinion, App. *infra*, p. 22). At no time did the Kentucky State Police or the prosecuting attorney offer to permit the petitioner or his court-appointed counsel to inspect the file or even advise them of its existence.

The report disclosed that blood of the same type as that of the deceased had been found on the front seat of the

* References are to the transcript of testimony and proceedings which is contained in the Record filed with Clerk of the Court, and which is printed in excerpt in the Appendix, *infra*, pp. 25-33.

petitioner's automobile (Tr. p. 40; App. [illegible] pp. 32-33). The results of the scientific test as contained in the report, therefore, would have corroborated the contention of the petitioner that the deceased was killed in petitioner's automobile due to the accidental discharge of petitioner's pistol when it was seized by the deceased, and would have contradicted the testimony of the prosecution's principal witness to the effect that the petitioner dragged the deceased outside of the automobile and there killed him. The results of this test were not introduced into evidence by the prosecution at the trial, and as stated previously, neither the petitioner nor his court-appointed counsel was ever advised that such a test had been conducted.

At the trial, after the prosecution had completed the presentation of its case and after the petitioner had testified, petitioner's counsel learned about the test for the first time (Court of Appeals Opinion, App. [illegible] p. 22). He then called as witnesses the Commander of the Kentucky State Police Post and the trooper who was in charge of the investigation. After establishing the circumstances in which the test was made, he asked the trooper to state what the report of the test disclosed. The prosecution objected to the introduction of this evidence, and the objection was sustained by the Court on the ground that a proper foundation had not been laid (Tr. p. 40). The report was read into the record by avowal (Tr. p. 40), but the jury was never informed of the results of the test.

The petitioner was convicted of murder and sentenced to life imprisonment. No appeal was taken from the conviction. A post-conviction proceeding was instituted on petitioner's behalf pursuant to the provisions of Kentucky Rules of Criminal Procedure, Rule 11.42. The judge of the

Harlan Circuit Court, without holding a hearing, overruled the motion on the grounds that the evidence had properly been excluded and that the petitioner had been derelict in not having attempted to obtain such evidence prior to trial (Circuit Court Opinion, App. *infra*, p. 19). The Court of Appeals affirmed on the ground that, "Conceding arguendo that it may be a failure of due process sufficient to void a conviction if the prosecution conceals evidence material to guilt or innocence which is favorable to an accused," the issue could only be raised by direct appeal and not by a post-conviction motion under Rule 11.42 (Court of Appeals Opinion, App. *infra*, pp. 22-23).*

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari to determine the substantial federal question, raised but left unanswered by its decisions in *Case* v. *Nebraska*, and *Smith* v. *Illinois*, whether the Fourteenth Amendment requires the states to afford state prisoners a corrective post-conviction process for the hearing and determination of all claims of violation of federal constitutional rights.

Rule 11.42 of the Kentucky Rules of Criminal Procedure contemplates a post-conviction review process, but it is grossly inadequate because of the arbitrarily restrictive

* There was no finding by either the Court of Appeals or the Circuit Court that the petitioner, who was indigent and represented by court-appointed counsel, was advised of his right to appeal and to have court-appointed counsel on appeal and that, notwithstanding such advice, he deliberately made a decision not to appeal.

interpretation that the Kentucky Court of Appeals has put upon the issues that may be raised. As interpreted by the Kentucky Court of Appeals, Rule 11.42 is theoretically available for a consideration of those constitutional violations "which may have had a bearing on the legality or the fundamental fairness of the trial." *Dupin* v. *Commonwealth*, 404 S.W.2d 280 (Ky. Ct. App. 1966). That the suppression of evidence favorable to the defense constitutes a violation of due process speaking the fundamental fairness of a trial is beyond question. See *Giles* v. *State of Maryland*, 386 U.S. 66 (1967); *Brady* v. *State of Maryland*, 373 U.S. 83 (1963). The Kentucky Court, in refusing to consider petitioner's claims, has thus made it very clear that no post-conviction remedy is available to redress critical federal constitutional rights, unless those rights fit within arbitrary and somewhat mysterious parameters.*

In view of the exhaustion requirements of the federal habeas corpus remedy, 28 U.S.C. §2254, the provision of a truncated post-conviction remedy like that in Kentucky is worse than none at all. In the case at bar, for example,

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* The post-conviction remedy of Rule 11.42 has been held to be available to challenge the violation of the right to the appointment and effective assistance of counsel: *Hammershoy* v. *Commonwealth*, 398 S.W.2d 883 (Ky. Ct. App. 1966); *McCarthy* v. *Commonwealth*, 432 S.W.2d 50 (Ky. Ct. App. 1968). It has also been held to be available to challenge a coerced plea of guilty, *Lewis* v. *Commonwealth*, 411 S.W.2d 321 (Ky. Ct. App. 1967), and the denial of a fair trial because of prejudicial publicity. *Baldwin* v. *Commonwealth*, 406 S.W.2d 860 (Ky. Ct. App. 1966). However, it has been held to be unavailable to challenge the validity of a conviction obtained by use of illegally seized evidence. *Collier* v. *Commonwealth*, 387 S.W.2d 858 (Ky. Ct. App. 1965); *Wahl* v. *Commonwealth*, Ky., 396 S.W.2d 774 (1965). *Dupin* v. *Commonwealth*, 404 S.W.2d 280 (Ky. Ct. App. 1966); cf. *Kaufman* v. *United States*, 394 U.S. 217 (1969); *Mancusi* v. *DeForte*, 392 U.S. 364 (1968). And in case at bar it was held not to be available to challenge the suppression of evidence by the prosecution and the police.

petitioner has spent a year exhausting a remedy which has proven to be non-existent.

This Court has never squarely decided the question whether the Fourteenth Amendment requires that the states afford state prisoners a corrective post-conviction process for the hearing and determination of all claims of violation of federal constitutional rights. Certiorari was granted to decide this question in *Case* v. *Nebraska,* 381 U.S. 336 (1965), but the judgment of the state court was vacated and the case remanded, since in the interim the legislature had enacted a statute providing for a post-conviction procedure. The question was also raised in *Smith* v. *Bennett,* 365 U.S. 708 (1961), but was not necessary to the decision of the case. 365 U.S. at 713.

Nonetheless, the Court has strongly intimated that such a requirement exists. In *Young* v. *Ragen,* 337 U.S. 235 (1949), the Court, while remanding the case for consideration of the question of the availability of habeas corpus relief stated:

> "Unless *habeas corpus* is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts . . . presupposes that some adequate state remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. *Nonetheless, that requirement must be met. If there is now no post-trial procedure by which federal rights may be vindicated*

in Illinois, we wish to be advised of that fact upon remand of this case." 337 U.S. at 238-239 (emphasis added).

In *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935), the Court, in finding that habeas corpus was available in California to raise the question of knowing use of perjured testimony, observed:

> "No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. . . . In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the State has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose." 294 U.S. at 213.

In *Taylor* v. *Alabama*, 335 U.S. 252, 272 (1948), Mr. Justice Frankfurter, after pointing out that the petitioner's conviction had already been affirmed on appeal, went on to say:

> "The Due Process Clause of the Fourteenth Amendment does require still further protection. A state must furnish corrective process to enable a convicted person, even after such proceedings as I have outlined, to establish that in fact a sentence was procured under circumstances which offend 'the fundamental conceptions of justice which lie at the base of our civil and political institutions'." (concurring opinion). See also *Carter* v. *Illinois*, 329 U.S. 173, 175-6 (1946).

The case at bar, where the state has expressly held that the violation of federal constitutional rights may not be asserted in a post-conviction proceeding, thus presents the Court with the opportunity to confront a fundamental question of due process which has eluded resolution.

Resolution of the instant case can also have important implications for federal-state relations at the judicial level, and should be undertaken by this Court for this reason as well. As Mr. Justice Brennan has observed:

> "None can view with satisfaction the channelling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedure." *Case v. Nebraska,* 381 U.S. 336, 344-345 (1965) (concurring opinion).

To impose on the states the requirement that they provide an adequate post-conviction remedy by which violations of constitutional rights may be asserted will not hamper the administration of state criminal justice, and will promote federal-state comity by putting the primary responsibility for the fairness of criminal proceedings where it belongs—upon the state itself. See the discussion in *Henry* v. *Mississippi,* 379 U.S. 443, 453 (1965).

This Court should grant certiorari to determine whether the Fourteenth Amendment requires the states to afford state prisoners a corrective post-conviction process for the hearing and determination of all claims of violation of federal constitutional rights.

II.

This Court should grant certiorari to determine the important question, relating to its appellate jurisdiction over state criminal proceedings, whether a decision of a state court refusing to set aside a conviction challenged in a post-conviction proceeding as violative of due process of law, because the prisoner had failed to appeal from his conviction, rests on an adequate state ground so as to preclude this Court from considering the substantive constitutional question.

In *Fay* v. *Noia*, 372 U.S. 391, 429 (1963), this Court expressly left open the question whether it could review the decision of a state court in a post-conviction proceeding in which the claimed violation of constitutional rights was rejected on the ground that it could not be asserted in such a proceeding. In the present proceeding the issue is squarely raised as to whether the "procedural fault" of the petitioner in failing to appeal from his conviction furnishes an adequate and independent ground of state decision precluding this Court from considering the substantive constitutional question of suppression of evidence. If the Court is not going to require that the states provide a post-conviction procedure by which all claims of violation of federal constitutional rights may be raised, this question may be expected to arise with some frequency. Other states that provide a form of post-conviction proceeding may well hold, as has Kentucky, that various critical constitutional claims may not be raised in that proceeding. In the case at bar the facts are not in dispute, and there is no practical reason why this Court cannot review the consti-

tutional claim on the merits. Certiorari should be granted to determine whether the "adequate state ground" concept bars such review.

In *Henry* v. *Mississippi*, 379 U.S. 443 (1965), this Court considered the "adequate state ground" concept in relation to procedural faults in state criminal proceedings and concluded that:

> "... a litigant's procedural faults in state proceedings do not prevent vindication of federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." 379 U.S. at 447-8.

It was on this basis that a state rule requiring objection after each question in a prolonged series was held not to be an adequate state ground barring direct review by this Court. *Douglas* v. *Alabama*, 380 U.S. 415 (1965). See also *Wright* v. *Georgia*, 373 U.S. 284 (1963). However, a state rule prohibiting the relitigation in a post-conviction proceeding of a question that was previously determined on appeal or in a prior post-conviction proceeding has been held to constitute an adequate state ground. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Durley* v. *Mayo*, 351 U.S. 277 (1956). The dimensions of *Henry* v. *Mississippi*, *supra*, remain unsettled.

This Court has not yet considered the question whether the denial of relief in a post-conviction proceeding on the ground that the petitioner had failed to appeal from his

criminal conviction constitutes an adequate state ground. It is submitted that under the test of *Henry* v. *Mississippi*, *supra*, the enforcement of such a procedural forfeiture serves no legitimate state interest so as to bar vindication of federal constitutional rights in this Court. The failure to appeal, it should be pointed out, does not affect the conduct of the trial as would, for example, a failure to challenge illegally seized evidence at the trial, as in *Henry* v. *Mississippi*, *supra*. Nor does the failure to appeal relate to relitigation as in *Johnson* v. *New Jersey*, *supra*. All the failure to appeal means is that the issue is being raised in post-conviction proceedings rather than on appeal, and since the state has made available such a proceeding, it is difficult to see how the state is prejudiced if the issue is raised in that proceeding rather than on appeal. It may be that the state wishes the proceedings to be "final." But, as this Court has stated, "Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary judicial review." *Fay* v. *Noia*, *supra* at 424. This should be as true for direct review by this Court as it is for collateral review in a habeas corpus proceeding.

The absence of a legitimate state interest in requiring the question of violation of constitutional rights to be raised on appeal is even more evident in Kentucky, since Kentucky permits *some* constitutional questions to be raised in post-conviction proceedings. The rule that certain constitutional claims cannot be raised in post-conviction proceedings—and the Kentucky Court of Appeals has not indicated the criteria for determining which constitutional claims can be raised and which cannot—is patently arbi-

trary and serves no legitimate state interest. Therefore, under the principles enunciated in *Henry* v. *Mississippi*, *supra*, it cannot constitute an adequate state ground barring appellate review by this Court.

III.

The facts of this case clearly establish a violation of due process of law, so flagrant as to require this Court to grant certiorari and order that the judgment of conviction be set aside.

The prosecution in the case at bar suppressed weighty scientific evidence which would have both discredited the testimony of the state's key witness and corroborated that of the petitioner. Suppression of exculpating evidence constitutes an unarguable denial of due process. *Giles* v. *State of Maryland*, 386 U.S. 66 (1967). *Brady* v. *State of Maryland*, 373 U.S. 83 (1963). Counsel for petitioner learned of the official tests made on petitioner's car only after the state's case had been concluded and the petitioner had testified. His last minute attempt to introduce the results of those tests was objected to by the prosecutor and barred by the Court. A more clearly prejudicial circumstance is hard to imagine.

The zeal with which the prosecution made its case was reflected in its closing argument to the jury:

> "I think one of the world's tragedies is for a man to go to Saipan in defense of his country, lose the muscles of his legs, lose most of his strength, and then come home and let a six-foot three, colored man jerk him out of an automobile, just back from a trip with

> Rev. Bowen, with a cocked .45 automatic under his belt and with a good reputation to kill a man under those circumstances." (Objection at this point overruled.)

"A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The States pursuit is justice, not a victim." *Giles* v. *State of Maryland, supra,* 386 U.S. at 100 (concurring opinion of Mr. Justice Fortas). The deliberate suppression of evidence favorable to the defense grossly oversteps the bounds of prosecutorial propriety.

The lower court, in denying the motion for post-conviction relief, stated that, "Said evidence was available to the defendant on request to the Kentucky State Policemen and the defendant was derelict in failing to make an effort to obtain the evidence." (App. *infra,* p. 19.) But the violation of due process is not vitiated by the failure of a criminal defendant or his counsel to make a request for evidence the existence of which may not have been known to them. The duty was not on the petitioner or his counsel to discover the evidence. It was on the police and the prosecutor to disclose it. As Judge Sobeloff stated in response to this argument in *Barbee* v. *Warden, Maryland Penitentiary,* 331 F.2d 842, 845-6 (4th Cir., 1964):

> "It is no answer that Barbee's attorney failed to ask for the results of the test. While a diligent defense counsel may have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial. He may not have known that the tests were made. Indeed he may have been misled into thinking that the test, if

> made, supported the state's theory and was adverse to his client. . . . In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel."

See also *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Cal. 1969). The duty of disclosure has nothing to do with the "diligence" of the defendant or his counsel, but is put upon the prosecutor and the police as an essential ingredient of due process of law.

In the case at bar there has been a flagrant violation of due process of law, which has been sanctioned by the Kentucky Court of Appeals solely because the indigent defendant, the petitioner herein, failed to take an appeal from his criminal conviction. Certiorari should be granted to redress that violation.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted to review the judgment of the Court of Appeals of Kentucky.

Respectfully submitted.

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August 1970

APPENDIX

Order of the Harlan Circuit Court

HARLAN CIRCUIT COURT

Indictment No. F1119A

THE COMMONWEALTH OF KENTUCKY,

Plaintiff,

versus

HERB CLAY, *et. al.,*

Defendants.

ORDER

The Court having considered motion of the defendant, Herb Clay, pursuant to Criminal Code section 11.42 is of the opinion that said motion should be overruled for the following reasons:

1. That the Court excluded the evidence relative to the blood sample test by virtue of the fact that no foundation was laid to establish the integrity of the sample in question,

2. That said evidence was available to the defendant on request to the Kentucky State Policemen and the defendant was derelict in failing to make an effort to obtain the evidence.

That under the Rules of Criminal Procedure in the State of Kentucky, the defendant or his counsel, or both, have the right to talk with and enquire of each of the witnesses for the Commonwealth relative to the extent of the testimony of the Commonwealth's witnesses of which the defendant did not avail himself.

At the request of the defendant, Herb Clay, the records of the Harlan Circuit Court have been ordered copied.

This the 12 day of August, 1969.

/s/ EDWARD B. HILL
Judge, Harlan Circuit Court

Opinion of the Court of Appeals of Kentucky

RENDERED: May 15, 1970

COURT OF APPEALS OF KENTUCKY

APPEAL FROM THE HARLAN CIRCUIT COURT

HONORABLE EDWARD G. HILL, *Judge*.

HERBERT CLAY,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

OPINION OF THE COURT BY COMMISSIONER WADDILL

AFFIRMING

In this RCr 11.42 post-conviction action Herbert Clay seeks to have his murder conviction vacated because of the prosecution's failure to timely disclose evidence which he contends would have supported his defense. The fatal shooting occurred on a Saturday night across the street from a place referred to as "The Club" and was witnessed by a woman who lived upstairs in a building adjoining "The Club." The victim, Nick Hatmaker, who had drunk considerable whisky, was asleep on the front seat of Clay's automobile when Clay came for it. It was Clay's contention that the gun went off accidentally when he was removing

Hatmaker from the car, but the Commonwealth's evidence was to the effect that the shooting was deliberate and occurred after Hatmaker was removed from the automobile.

After the prosecution had completed its case in chief and after Clay had testified in his defense, counsel learned of a Kentucky State Police test which had been made available to the prosecution and which disclosed that blood of the same type as the victim's had been found on the front seat of the automobile. Counsel for the accused attempted to get the test into evidence through a State Trooper but the trial court refused to admit it because it apparently concluded a proper foundation had not been laid to justify its admission. No appeal was taken from the judgment of conviction and it is now asserted that Clay's constitutional rights were violated by the failure of the prosecution to reveal the test to the defense in time for it to be used at the trial. The present appeal is from a judgment on this RCr 11.42 proceeding refusing to vacate the conviction.

Conceding arguendo that it may be a failure of due process sufficient to void a conviction if the prosecution conceals evidence material to guilt or innocence which is favorable to an accused (Giles v. Maryland, 386 U.S. 66 (1967); Brady v. Maryland, 373 U.S. 83 (1963)), when disclosure must be made necessarily would be in time for it to be of value to the accused. Hamric v. Bailey, 386 F. 2d 390 (4th Circuit 1967).

The accused had a remedy by appeal for the consideration of the questions raised here, but he did not appeal. We have consistently held that RCr 11.42 procedure is not a substitute for an appeal and does not permit a review of all trial errors. Harris v. Commonwealth, Ky., 441 S.W. 2d

143 (1969); Adams v. Commonwealth, Ky., 424 S.W. 2d 849 (1968); Connors v. Commonwealth, Ky., 400 S.W. 2d 519 (1966); Kiper v. Commonwealth, Ky., 415 S.W. 2d 92 (1967).

Consequently, we affirm the judgment denying RCr 11.42 relief.

The judgment is affirmed.

All concur except Neikirk, J., not sitting.

Mandate of the Court of Appeals of Kentucky (Judgment)

THE COMMONWEALTH OF KENTUCKY

THE COURT OF APPEALS

Spring Term—May 15, 1970

HERBERT CLAY,

vs.

COMMONWEALTH OF KENTUCKY.

Appeal from a judgment of the Harlan Circuit Court.

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

Judge Neikirk not sitting.

A copy—Attest:

DICK VERMILLION, *C. C. A.*
By /s/ JOHN C. SCOTT, *D. C.*

Issued June 16, 1970

Excerpts From Transcript of Proceedings at Petitioner's Trial, Harlan Circuit Court, March 28, 1968

TESTIMONY OF MAE WHITUS

Direct Examination by Mr. Daniel Boone Smith:

* * * * *

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Q. Tell this jury what you saw either one of these three men do or what you heard them say, starting with when Herb Clay got out there. A. When he got there, he said "Get your so and so out of my dam car". "Screwdriver" got out the back seat and stood up there beside the car, and he went around to Mr. Hatmaker and told him to get out of the car, and he said "This is my car".

Q. The white man said that? A. Yes. He said "This is my car", and Herb said "It is my car" and said "Get out of my car". When he didn't get up, Herb pulled him out.

Q. Who pulled who? A. Herb pulled the white man

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out of the car.

Q. Did he get him all the way out? A. He pulled him out once and the white man went to get back in the car. He snatched him out and shoved him up against "Screwdriver" and that time he shot the man. Betty said "Herb, what did you shoot that man for".

Q. Who is Betty? A. His wife, Betty.

Q. Was she standing out there at the time? A. Yes, she was out there too.

Q. How soon after she said "Why did you shoot that man", how long was that after the shooting happened?

A. He told them all, there was a gang out there, he told them all to get back to the club and he slapped her.

Q. That is the tall colored boy over there? A. Yes. He slapped her.

Q. When Nick Hatmaker was pulled out of the car the second time, what was he trying to do or what was he doing? A. He wasn't doing nothing.

Q. Was he fighting? A. No, sir. He didn't have no knife and he didn't have no gun.

Q. Did you see his hands? A. Yes, he didn't have nothing in his hand.

Q. What did Herb Clay say to him after he slammed him up against the car and fired the shot? A. He didn't say nothing. They all left and come back across the street, and "Screwdriver" led him across the street.

Q. Led who? A. Mr. Hatmaker. He led him across the street. When he led him across the street, he stood him up there, and some of them said he stomped him, and he wanted to stomp him I know.

Q. How do you know?

* * * * *

TESTIMONY OF HERB CLAY:

Direct Examination by Mr. James C. Brock:

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Q. I will remind you, Mr. Clay, to speak so everybody on the jury can hear everything you say. How old were you in September of last year? A. I'm twenty-six years old.

Q. At that time where did you live? A. I lived in a place they call "Wade's Alley" over from Greene Motor Company.

Q. Here in Harlan? A. Harlan.

Q. Will you tell the jury in your own words what took place immediately before and at the time of the shooting of Nick Hatmaker? A. Yes, sir. I know what happened there because I was involved in it. First, I went into Club of Harlan. I had just got back from Manchester with Rev. Bowen squirrel hunting. I stayed in there approximately fifteen minutes. I was sitting there in the back end where they have a pool room and James Albert Jones, he came through the door as I was coming out of the pool room. He said "A man" or "Two men" or "Them men is taking your car". I said "Ah, get away, you playing", because the man plays so often. I started on out anyway. I was going out when he told me in the first place. When I got to the steps of the Club Harlan, I started down the steps. I saw lights come on the car, the motor was on. About middle way was Charles Owens, he was staggering. I don't know where he was going. I didn't ask him where he was going. We never talked before no way so I go over next to the car and get ten or fifteen feet, I said "A what you doing". No one said anything. Somebody slammed on my gas accelerator. The tires started screaming and the car began to jerk. It jerked until it killed the motor, so I went to the car and leaned in the window which was already down on the driver's side. I said, "A fellow, what you doing"? He never said a word. I said "What are you doing". He said "I'm fix-

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ing to drive". I said "Well, you got the wrong car". He said "I be dammed if I got the wrong car", so I looked at the guy and the guy was fumbling with the ignition key. The car was in drive and I knew it would not start until he pushed the gear shift up to park, because it was auto-

matic shift park. He continued to fool with it. I said, "A, how much have you had to drink". He said "None of your dam business". He kept on with the key. He finally recognized the car wouldn't start. When he started to pull the gear shift, every time he pulled it down, I would push it back up. I said "No, it is best you come on out because you are drunk". He said "I ain't drunk". I said, "Oh, yes, you are". He said "No, I'm not". He pulled the gear shift down and I pushed it back up. During this time I reached and opened the door with my left hand. I said "Come on out". He said "No, I'm not coming out of here. All you niggers think somebody is crazy". I said "No, no-one is trying to hurt you, come on out, you got the wrong car". The man said "I will kill every nigger over here". The man ran his hand toward his pocket. I don't know where he was going. I caught him by the right hand. I said "No, don't do that, come on out, go on about your business or find your car". He never said a word but he did act like he was coming out of the car. I pulled the man over half way out of the car, with one foot in the corner kindly in a cramped position, one foot was on the ground. I had on a slipover sweater and a shirt and tight pair of pants which did not use a belt. I had a 45 automatic stuck in my belt. When I pulled the guy out of the car, he come on out willingly, so when I took and opened the door, I mean, reached for the keys. I was going to get the key out of the ignition switch, because I did know I left them in there, the guy got hold of the gun in my belt. When he got hold of the gun, I had to automatically turn loose of the guy to fight for the gun. When I caught hold of the gun, he fell back into the car, because he was off balance which caused me to

lean with him. When we both fell back into the car slightly, him falling and me leaning, the gun fired. I didn't know whether it shot him or shot in the seat, I do know the gun hit something soft, so I took the gun away from him, twisted it out of his hand and I laid it on top of the car. I said "Fellow, are you shot". He didn't say anything. I said "Are you shot" and he said "Hell, no, I'm not shot. Get away from here", so the man started kicking me. By this time, Mr. Owens come around. He said "Get me out of here". Mr. "Screwdriver tells me, he says "Watch out, because I'm with the guy". He caught the guy by the arm and took him on down the street. They was both staggering. It scared me because I didn't know whether the guy had got shot or what. The last thing I can think of, I took the gun off top of the car and walked to the back of the car and ejected the shell out of it because it was hung with both of us holding it, and it flipped out on the street, put the gun back in my belt and went back into Club Harlan, and fifteen or twenty minutes, maybe, before someone come in and said the man is cut. It didn't bother me none the man was cut. I knew I hadn't cut him. When I finally found out the man had been shot, I said "The man stood a good chance getting shot with my gun", so I turned to go to City Hall, which Mr. Belcher was there and he was awful nice and he brought me over to the county. I have been here ever since.

Q. Had you had anything to drink anytime that day or evening before this shooting took place? A. No, sir, I had drove all the way from Manchester, I hadn't had a drop. I drink sometimes but I had not had a drink because I was with Rev. Bowen.

* * * * *

TESTIMONY OF GURNEY LUTTRELL

[37]

Direct Examination [by Mr. Brock]:

Q. State your name and rank with the state police. A. Gurney Luttrell, Post Commander, Kentucky State Police, Post 10, Harlan, Kentucky.

Q. Did you hold that official position on the 23rd and 24th of September, 1967? A. I did, sir.

Q. Did you undertake an investigation relating to the killing of one, Nick Hatmaker, on the 24th of September? A. I did, sir.

Q. What did that investigation consist of? A. It consisted of taking some samples from the seat of the automobile to determine analysis of what they were.

Q. Had you previous to that time learned of the identity of that automobile as to who the owner was? A. Yes, sir, I did.

Q. Who was the owner of that automobile? A. I was told that it was Mr. Clay's automobile.

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Q. Mr. Herb Clay? A. Yes, sir.

Q. Is that the same automobile from which you took a sample of something? A. Yes, sir.

Q. What did that sample consist of? A. It was part of the seat, cotton and red stains.

Q. What did you do with that sample? A. I put it in an envelope, sealed it and gave it to Trooper Green Long in person.

Q. Did you give Trooper Green C. Long instructions as to regard of the contents of that envelope? A. Yes.

Q. What were the instructions? A. I told him what I had done and mark it and send it to the laboratory in Frankfort for analysis.

Q. Have you seen the substance that you turned over to him since that time? A. No, sir, I have not.

Q. Have you seen any report of analysis with regard to the substance in the envelope? A. I have seen a report but I have not read it.

Q. Do you know where that report now is kept? A. Yes, sir.

Q. Where? A. It is in a folder with the case report.

Q. Is that case report of the homicide of Nick Hatmaker? A. Yes, sir, it is.

(Witness excused.)

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TESTIMONY OF GREEN C. LONG

Direct Examination by Mr. James C. Brock:

Q. What is your name? A. Trooper Green C. Long.

Q. Are you Trooper with the Kentucky State Police? A. That is correct.

Q. Were you on the 23rd and 24th of September, 1967? A. I was.

Q. Did you have any connection officially with the investigation of the homicide of Nick Hatmaker? A. Yes, sir, I did.

Q. What did that consist of? A. That consisted of a sample for analysis I received from Sergeant Luttrell. I sent that to the laboratory, interviewing different witnesses and making a record of my findings.

Q. Did you compose a file for the records of the Kentucky State Police Post 10? A. I did.

Q. As a part of that file, do you have a package which purports to contain the sample that you sent to the State Police Laboratory? A. Yes, sir.

Q. Did you receive a report from that laboratory accompanied with the sample returned to you? A. Yes, sir.
Q. Will you tell the Court what that report disclosed?

Commonwealth Objects: Objection sustained, to every bit of it. This is all avowal.

Mr. Daniel Boone Smith: Move to exclude.

Court: Sustained. Go ahead.

A. The report is dated, October 30, 1967, to Superinten-
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dent, Kentucky State Police, Frankfort, Kentucky. Attention, Captain James W. Hughes, Commander of Bureau of Investigation, states: This examination has been made with the understanding that the evidence is connected with an official investigation of a criminal matter, and that the laboratory report will be used for official purposes only, relating to the investigation or a subsequent criminal prosecution. Authorization cannot be granted for use of the laboratory report in connection with a civil proceeding. Signed by J. Edgar Hoover. In reference to Herbert Clay, suspect, Francis Lee Hatmaker, victim, murder. Your file 10-8343. F.B.I. File No. 95-10896. Laboratory No. PC-AL976LG. Examination requested by addressee. Reference letter 10/10/67. Examination requested, chemical analysis, specimens QI, portion of seat, K-1, blood from victim. Results of examination: Grouping test conducted on specimen KI, discloses that the victim belonged to blood group "A". Group "A", human blood was identified on specimen Q-I. The submitted evidence is being returned to you under separate cover by registered mail. This is contents of the report we received.

Mr. Daniel Boone Smith: At this point, I move to exclude the report and all evidence connected with it.

The Court: Sustained the objection.

* * * * * *

CLOSING ARGUMENTS

[48]

Argument of the case was made to the jury on behalf of the defendants by Mr. James C. Brock.

Argument of the case on behalf of the Commonwealth was made to the jury by Mr. Daniel Boone Smith.

Objections were made by Mr. James C. Brock to the following statements made by Mr. Daniel Boone Smith in his argument to the jury.

"Human life in some countries is worthless in some countries. Right today, American boys are being killed over seas."

Objection: Objection overruled.

"I think one of the world's tragedies is for a man to go to Saipan in the defense of his country, lose the muscles of his leg, lose most of his strength, and then come home and let a six foot, three, colored man jerk him out of an automobile, just back from a trip with Rev. Bowen, with a cocked 45 automatic under his belt and with a good reputation to kill a man under those circumstances.

Objection: Objection overruled.

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Supreme Court of the United States

No. 694, October Term, 1970

HERBERT CLAY ----------PETITIONER

V.

COMMONWEALTH OF KENTUCKY ----------RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States

No. 694, October Term, 1970

HERBERT CLAY ----------*PETITIONER*

V.

COMMONWEALTH OF KENTUCKY ----------*RESPONDENT*

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I. Whether the question of the adequacy of Kentucky's postconviction remedy was raised or decided in the court below so as to give this court jurisdiction; if so, whether the question is no insubstantial as not to warrant review by this court.

II. Whether the question of alleged foreclosure of a constitutional issue by failure to appeal was raised or decided in the court below so as to give this court jurisdiction; if so, whether on the basis of the record the question is so insubstantial as not to warrant review by this court.

III. Whether the question of alleged failure of the state to disclose evidence is so insubstantial as not to warrant review by this court when it is undisputed that the petitioner had knowledge of the evidence before the conclusion of trial at a time when it could have been presented to the jury.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner does not state what constitutional provision is involved, but it appears that he relies on the Fourteenth Amendment provision that no state shall "deprive any person of . . . liberty . . . without due process of law."

STATEMENT

Petitioner was sentenced to life imprisonment for willful murder after a trial by jury. Denial of his application for post-conviction relief based on the alleged failure of the state to disclose evidence was affirmed by the Court of Appeals of Kentucky on the ground that the record showed the evidence was disclosed in time for it to be of value to petitioner at trial. *Clay v. Commonwealth*, Ky., 454 S.W.2d 109 (1970); Appendix to Petition, pp. 21-23.

Petitioner admitted at trial that at the time of the shooting he was carrying a 45 automatic cocked under his belt, and that the decedent was shot with that gun (Transcript of Evidence, hereafter TE, pp. 28-34). The only eyewitness, one Mae Whitus, testified that petitioner pulled the decedent out of petitioner's car, shoved him up against another person who had been in the car and shot him (TE 2-10). She also testified that the decedent was unarmed and was "doing nothing" to petitioner at the time of the occurrence (TE 4). Petitioner testified the shooting resulted from accidental discharge of his cocked automatic during a struggle to remove the decedent from his car (TE 26-33).

During presentation of defense evidence, petitioner attempted to introduce results of a Kentucky State Police blood test concerning blood found in the car, but the evidence was excluded, apparently because the integrity of the sample was not properly established (Transcript of Record, hereafter TR; p. 19; (TE 39, 40). Although the petitioner subsequently called two other witnesses during the presentation of his case, no further attempt was made to authenticate the blood test evidence, nor was any request made for additional time to produce such evidence (TE 40-44).

In this proceeding, petitioner seeks review on certiorari of the denial of post-conviction relief by the Kentucky Court

of Appeals. His sole contention there was that the state failed to disclose evidence, and no contention was made concerning the adequacy of Kentucky's post-conviction relief procedure or the failure of petitioner to take a direct appeal.

ARGUMENT

I. THE QUESTION OF THE ADEQUACY OF KENTUCKY'S POST-CONVICTION RELIEF PROCEDURE WAS NOT RAISED OR DECIDED BELOW SO AS TO GIVE THIS COURT JURISDICTION; IN ANY EVENT, THE PROCEDURE IS PATENTLY ADEQUATE AND THE QUESTION IS SO INSUBSTANTIAL AS NOT TO WARRANT REVIEW BY THIS COURT.

Rule 23-1(f) of the Rules of this Court specifically requires that if review of a judgment of a state court is sought, the petitioner "shall . . . specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." It is well settled that a question must be actually raised and decided in a state court in order to give this Court jurisdiction to review it on certiorari. *Adelman v. California*, 344 U.S. 357 (1953); *Beck v. Washington*, 369 U.S. 541, 553-54 (1962); *Maxwell v. Newbold*, 18 How. (U. S.) 511 (1856); Annotations, 100 L.ed. 1200 (1956), 84 L.ed. 925, at 935 (1940). It is clear that the prerequisites to certiorari jurisdiction have not been met on this point.

In any event, Kentucky's post-conviction procedure is clearly adequate. In 1963, the Kentucky Court of Appeals broadened the scope of review under post-conviction remedies so as to coincide with federal habeas corpus. *Rice v. Davis*, Ky., 366 S.W.2d 153 (1963). Effective January 1, 1963, the Kentucky Court of Appeals adopted Kentucky Rule of Criminal Procedure 11.42, (hereafter RCr 11.42), set out in full in its present form in the Petition (pp. 2-4), which is "comparable with the remedy provided federal prisoners by 28 U.S.C., § 2255," *Jones v. Davis*, 336 F.2d 594 (6th Cir. 1964), and "is intended to provide a more satisfactory form of remedy . . . than is practicable under habeas corpus." *Ayers v. Davis*, Ky., 377 S.W.2d 154 (1964). Federal courts have consistently refused to entertain habeas corpus petitions until the remedy under Kentucky's rule has been exhausted. *Gray v. Wingo*, 391 F.2d 268 (6th Cir. 1967); *Weigand v. Wingo*, 380 F.2d 1022 (6th Cir. 1967); *Jones v. Davis*, supra; *Nolan v. Thomas*, 230 F.Supp. 114 (W.D.Ky. 1964).

Under the rule, a prisoner is afforded "full and fair opportunity to litigate" his claims, including "the bare essentials" of (1) effective assistance of counsel; (2) a hearing, (3) resolution of material facts; (4) a transcript of the record in the event of an appeal; and (5) an appeal. *Coles v. Commonwealth*, Ky., 386 S.W.2d 465 (1965). As stated by the Court of Appeals of Kentucky in directing that a habeas corpus proceeding be construed as an RCr 11.42 motion and that a hearing be held, the post-conviction remedy under the rule "is constitutionally adequate if the trial courts adequately apply it." *Schroader v. Thomas*, Ky., 387 S.W.2d 312 (1965). That Court readily compels trial courts to comply with the rule by the extraordinary remedy of mandamus. See, for instance, *Brummett v. Knuckles*, Ky., 409 S.W.2d 807 (1966); *Bingham v. Stivers*, Ky., 396 S.W.2d 800 (1965).

Finally, the Kentucky Court of Appeals readily follows precedents of this Court in the application of the rule. See, for instance, *Stinnett v. Commonwealth*, Ky., 446 S.W.2d 292 (1969), adopting *Rodriquez v. United States*, 395 U.S. 327 (1969), and overruling earlier Kentucky precedents to the contrary.

Petitioner candidly cites numerous Kentucky cases in which the remedy was applied to enforce federal constitutional rights, but relies on *Collier v. Commonwealth*, Ky., 387 S.W.2d 858 (1965), and subsequent cases relating to the nonreviewability of search and seizure questions under the rule, to support his conclusion that the rule is inadequate. We think it sufficient to note that the federal cases fairly relied on by Kentucky in *Collier* are no longer authoritative in view of *Kaufman v. United States*, 394 U.S. 217 (1969), and that *Kaufman* has not yet been considered by the Court in that regard. We have no doubt it will be readily followed when it is considered, just as was *Rodriquez*.

Apparently, petitioner's greatest reliance in this connection is on his failure to obtain relief in this proceeding. His disagreement with the Kentucky Court of Appeals on its decision in a single case, particularly his own, scarcely demonstrates the inadequacy of the remedy. Moreover, adequate reason for the result in this case will be demonstrated hereinafter.

II. THE ALLEGED FORECLOSURE OF THE CONSTITUTIONAL QUESTION BY FAILURE TO APPEAL WAS NEITHER RAISED NOR DECIDED IN THE STATE COURT SO AS TO GIVE THIS COURT JURISDICTION; THE QUESTION ON THE INSTANT RECORD IS SO INSUBSTANTIAL AS NOT TO WARRANT REVIEW BY THIS COURT.

In the court below, the state did not claim and the court did not decide that the failure to appeal foreclosed the federal constitutional issue. The state contended, and the court decided, that the allegations of failure to disclose evidence in light of the undisputed record which showed it was available to petitioner at trial were insufficient to establish a federal constitutional violation under decisions of this Court. 454 S.W.2d at 109-10; Appendix to Petition, second last full paragraph, p. 22. The subsequent observation of the court that it would not review the point on the question of whether it was a trial error (short of constitutional proportions) was simply a reflection of its past decisions, consistent with those under 28 U.S.C. § 2255, that post-conviction review under Kentucky's rule does not extend to claims of ordinary trial errors short of constitutional proportions. The cases cited by the court in its last full paragraph so indicate.

Thus, it is clear from the record and the opinion of the court that petitioner's constitutional claim was rejected because the alleged suppressed evidence was known to him at trial. He filed no petition for rehearing and no question was presented or decided as to whether the failure to appeal foreclosed the *constitutional* claim.

Therefore, certiorari should be denied on this point (1) because petitioner's contention completely misconstrues the holding of the court below; and (2) because his contention was neither raised nor decided below. See the cases cited under our first argument.

III. THE ALLEGED FAILURE TO DISCLOSE EVIDENCE IS SO INSUBSTANTIAL AS NOT TO WARRANT CERTIORARI WHEN IT IS UNDISPUTED THAT PETITIONER HAD KNOWLEDGE OF THE EVIDENCE BEFORE CONCLUSION OF THE TRIAL.

Petitioner advances the contention that the prosecution in the case at bar "*suppressed* weighty scientific evidence which would have both discredited the testimony of the state's key witness and corroborated that of the petitioner." (Petition, p. 15). (Emphasis added.) This is a misleading and incorrect statement. As petitioner admits, trial counsel for petitioner learned of the results of the blood sample test *during the course of trial.* (Petition, p. 15). The trial had *not* been concluded, after which the petitioner learned of suppressed exculpatory evidence, as in the cases cited by petitioner. *Giles v. State of Maryland,* 386 U.S. 66 (1967), *Brady v. State of Maryland,* 373 U.S. 83 (1963). The jury had *not* retired to consider the evidence and return a verdict, as in *Hamric v. Bailey,* 386 F.2d 390 (4th Cir., 1967). As to whether there was a suppression of the evidence favorable to the accused, the Court in *Hamric* said:

> "Finally, on the issue of suppression, we conclude that disclosure of the undisclosed evidence *after the jury had retired* was too late to overcome the requirements of Brady. If it is incumbent on the state to disclose evidence favorable to an accused, manifestly, that disclosure to be effective must be made at a time when the disclosure would be of value to the accused. Possibly the jury's deliberations could be interrupted for the purpose of taking additional testimony, but the potential prejudicial effect to an accused of such an extraordinary procedure persuades us that *Brady,* to be given vitality, must be interpreted to require disclosure, at least, *before the taking of the accused's evidence is complete.*" 386 F.2d at 393. (Emphasis added.)

In *United States v. Manhattan Brush Co.* 38 F.R.D. 4 (1965), the Court in discussing the requirements of *Brady v. Maryland,* supra, said the following:

> "The *Brady* decision must be understood to refer to the application of tests of fairness to the prosecu-

tion *at trial, and not at an earlier point in the proceedings.*" 38 F.R.D. at 6. (Emphasis added.)

In the case at bar, petitioner had knowledge of the test and its results during the course of the trial, and before the completion of the taking of the accused's evidence. It cannot be said this disclosure was too late to be "of value to the accused." Petitioner argues that the case at bar is analogous to *Giles* and *Brady*. Upon fair analysis, those cases are clearly distinguishable because the evidence involved was *suppressed* and *unknown* through trial. Here, there was not only no factual allegation of deliberate suppression, but rather the test result was actually known to petitioner before conclusion of his evidence.

Petitioner quotes from *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 845 (4th Cir. 1964) (Petition, p. 6):

> "It is no answer that Barbee's attorney failed to ask for the results of the tests. While a diligent defense counsel *might have learned* about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial." (Emphasis added.)

Again that case is clearly distinguishable because the plain unarguable fact is that petitioner *had learned* of the results of the blood sample test at trial.

Petitioner cites no cases which are directly in point with this one. We wholeheartedly agree with the Court's holding in those cases cited by petitoner as instances where the accused was not afforded due process of law because he was deprived at trial of exculpatory evidence through deliberate suppression by the prosecution. This is simply not such a case. It appears, rather, that the evidence was excluded because of failure to establish a proper foundation. Whatever the reason, one thing is absolutely clear and dispositive: the

evidence was *known* to petitioner and it was not through concealment by the prosecution that it was excluded. No suggestion was made at trial to the contrary, nor was there any request for additional time.

In an apparent effort to overcome this shortcoming in his constitutional contention, petitioner makes some oblique reference to the fact that there was no direct appeal. (Petition, p. 7, n., p. 17.) The simple answer to that is that petitioner's post-conviction motion was filed by his Kentucky counsel who represents him in this Court. We have no hesitation in saying that his diligent and scholarly Kentucky counsel would have included such a claim of denial of appeal, had there been any. He failed to do so (TR 14-18), and there is of course no justification for assuming or speculating such a denial at this late date. If such be the case, the denial may be rectified in a timely and proper manner through the same post-conviction procedure petitioner so vigorously deprecates in this Court. See *Stinnett v. Commonwealth*, supra.

This aspect does explain why the Kentucky Court of Appeals deemed it appropriate to observe that no such appeal was taken and that there was no occasion to treat the complaint as it might be treated on a direct appeal. It was consideration of this question of competency of trial evidence which was barred by failure to take a direct appeal.

The long and short of this case is that petitioner seeks to convert an ordinary question of admissibility of trial evidence into a constitutional question by couching it in terms of *concealment*, contrary to the record, rather than in its actual context of *exclusion* of evidence. Clearly the question thus presented is so insubstantial as not to warrant review on certiorari.

CONCLUSION

The Kentucky Court of Appeals fairly and correctly denied relief on the basis of the record. Petitioner's first two contentions here were neither raised nor decided there, and are without substance in any event. His third contention, which is in effect a question of admissibility of trial evidence, is, like the first two, clearly so insubstantial as not to warrant review on certiorari. The petition should be denied.

Respectfully submitted,

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